

**OPINION
49-185**

June 30, 1949 (OPINION)

TAXATION

RE: Sales Tax

Your letter of June 29 addressed to the Attorney General has been received and contents of same have been noted.

You refer to House Bill No. 163 enacted by the legislature which is the sales tax act effective July 1, 1949, and expires by its own limitation on June 30, 1951. This act levies a tax of two percent upon the gross receipts from all sales of merchandise, except as otherwise provided in the act, sold at retail in the state of North Dakota to consumers or users. A like rate is also imposed upon the gross receipts from the sales, furnishing or service of steam, gas, electricity, water and communication service and other services as enumerated in Section 2 of said act.

Your inquiry is whether or not under the provisions of this act sales of less than 25[^] are to be included in the gross sales on which the retailer remits the two percent sales tax.

Section 1 of said act defines the words, terms and phrases used in the act and provides that they have the meaning ascribed to them in the section except where the context clearly indicates a different meaning.

It is not necessary for the purpose of answering your inquiry to recite herein all of these definitions. The sales upon which the tax is levied are sales made by retailers and include such tangible goods, wares or merchandise and other items and services as defined in subdivision 5 of section 1 of the act.

Subdivision 6 of section 1 of the act defines "gross receipts" as follows:

'Gross receipts' means the total amount of the sales of retailers, valued in money, whether received in money or otherwise, provided, however, that discounts for any purposes allowed and taken on sales shall not be included, nor shall the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit. Provided, however, that on all sales of retailers, valued in money, when such sales are made under conditional sales contract, or under other forms of sale wherein the payment of the principal sum thereunder be extended over a period longer than sixty days from the date of sale thereof that only such portion of the sale amount thereof shall be accounted, for the purpose of imposition of tax imposed by this act, as has actually been received in cash by the retailer during each quarterly period as defined herein;"

Section 2 imposes the tax and the language of same is as follows:

There is hereby imposed, beginning the first day of July, 1949 and ending the 30th day of June, 1954 a tax of two percent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this act, sold at retail in the state of North Dakota to consumers or users; a like rate of tax upon the gross receipts from the sales, furnishing or service of steam, gas, electricity, water and communication service, including the gross receipts from such sales by any municipal corporation furnishing steam, gas, electricity, water and communication service to the public in its proprietary capacity, except as otherwise provided in this act, when sold at retail in the state of North Dakota to consumers or users; and a like rate of tax upon the gross receipts from all sales of tickets or admissions to places of amusement and athletic events and the playing of a record on a vending machine, in response to a coin placed in a slot, except as otherwise provided in this act. The tax herein levied shall be computed and collected as hereinafter provided."

Section 3 enumerates the class of property exempt from the tax.

A sales tax act was first enacted in this state by the Legislative Assembly of 1935. It was effective during the biennium only and expired at the end of the biennium by its own limitation. However, it was reenacted in practically the same form each succeeding session of the legislature, the last enactment being House Bill 163 of the Legislative Assembly of 1949.

The purpose of the enactment of the sales tax act in 1935 was to provide funds for the public schools of the state that were operating under extreme difficulties because of the lack of funds. The act was referred to a vote of the people at a special election held July 15, 1935 and approved by a substantial majority.

At the primary election held on June 25, 1940, two initiated measures were approved by the people of the state. They appear as Chapter 308 and Chapter 309 in the Session Laws of 1941.

Chapter 308 provides that all moneys coming into the state treasury from and after the effective date of this act as the proceeds of any sales tax heretofore or hereafter adopted by the legislature of the state of North Dakota after deducting actual expenses for administering such sales tax act, shall be placed in a separate fund and no disbursements shall be made therefrom save and except for the purpose of meeting the appropriations for education through the state equalization fund and for relief through the public welfare fund.

Chapter 309 provides that the net amount of moneys derived from the sales tax shall be and constitute a special trust fund to be used and disbursed solely for educational and welfare purposes in the following proportions: Seven-twelfths of said trust fund shall be used and disbursed solely for educational purposes through the equalization fund and five-twelfths of said trust fund shall be used and disbursed solely in the payment of appropriations made for public welfare.

During all of the time that the sales tax law of this state has been in operation there has been a working agreement between the State Tax Commissioner and the retailers of the state to the effect that no tax should be collected on sales from 1^ to 14^; on sales of 15^ to 65^ a charge of 1^; on sales of 66^ to \$1.24 a charge of 2^. There was, however, no provision in the said statutes for any such working agreement.

The Legislative Assembly of 1949, however, prepared a bracket or schedule to be used by retailers in the application of the tax which is set out in Section 6 of the act as follows:

\$0.01 to \$00.24.....	no tax
.25 to .74.....	1^ tax
.75 to 1.24.....	2^ tax
1.25 to 1.74.....	3^ tax
1.75 to 2.24.....	4^ tax
2.25 to 2.74.....	5^ tax
2.75 to 3.24.....	6^ tax
3.25 to 3.74.....	7^ tax
3.75 to 4.24.....	8^ tax
4.25 to 4.74.....	9^ tax
4.75 to 5.24.....	10^ tax
5.25 to 5.74.....	11^ tax
5.75 to 6.24.....	12^ tax
6.25 to 6.74.....	13^ tax
6.75 to 7.24.....	14^ tax
7.25 to 8.24.....	16^ tax
8.25 to 8.74.....	17^ tax
8.75 to 9.24.....	18^ tax
9.25 to 9.74.....	19^ tax
9.75 to 10.24.....	20^ tax
Each additional 50^.....	1^ additional tax

The language employed in section 6 appears to have raised the question as to whether or not items of sales of 1^ up to and

including 24^ are subject to the tax imposed by the act. It will be observed in the schedule or bracket that line one reads as follows: "\$0.01 to \$00.24.....no tax"

Considered apart from the other provisions of the act the language, "\$0.01 to \$00.24.....no tax," may give some support to the contention that items of sales of 1^ to 24^ are exempt. However, the act must be considered as a whole and all its provisions construed together. Subdivision 6 of section 1 quoted herein provides that "'Gross receipts' means the total amount of the sales of retailers, valued in money,".

Section 2 provides that, "There is hereby imposed, beginning the first day of July, 1949 and ending the 30th day of June, 1951 a tax of two percent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this act, sold at retail in the state of North Dakota to consumers or users;". It is clear that the tax is imposed upon the gross receipts from all sales of tangible personal property, except as otherwise provided in the act. The question then arises as to what is meant by the phrase "except as otherwise provided in this act." This phrase "as otherwise provided in this act" has been in every sales tax act enacted in this state. As construed in previous sales tax acts the phrase "except as otherwise provided in this act" has reference to the exemption from the tax as enumerated in section 3 of the act. There is nothing in the exemptions which refers to the schedule or bracket set out in section 6. It is reasonable therefore to assume that this schedule was prepared for the convenience of the retailer in computing the tax and not as an exemption of items of sales of 1^ to 24^. The schedule was undoubtedly prepared with considerable care and that in the average run of sales the amounts of 24^ and under on which no tax was applied would be compensated for by other items. For instance, items of 25^ to 74^ would be subject to the application of 1^. All items of 25^ and under 50^ would pay a tax of more than two percent which would offset the items between 1^ and 24^. It was undoubtedly considered by the legislature that the schedule or bracket as prepared would make an equitable application of the tax to the gross sales by the retailer to the consumer.

The Tax Commissioner appeared before the legislative committees when this bill was under consideration and it was clear from the expressions of the members of the committees that there was no intention to exempt items of from 1^ to 24^ from the tax or that the total of such items should be deducted from the gross receipts of retail sales. The purpose of the legislative committee in preparing the bracket or schedule was to make it more convenient for the retailer in applying the tax since it is impracticable to make an accurate application of the tax to small items of sales.

While the language in the first line of section 6, "\$0.01 to \$0.24.....no tax" may possibly lead to a different conclusion, it is the opinion of this office that the "gross receipts" of retailers of sales to consumers are subject to the tax as provided in section 2 of the act, and that the only exemptions from the tax are those enumerated in section 3 of the act.

It is further the opinion of this office, therefore, that it is the duty of the Tax Commissioner to collect a tax of two percent upon the gross receipts of the sales of retailers to consumers, subject only to the exemptions provided in section 3 of the act.

WALLACE E. WARNER

Attorney General